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No. 96-152

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

RUDOLPH W. GIULIANI, as Mayor of the City of New York, *et al.*,

Petitioners,

against

HAROLD YOURMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CITY TRANSIT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Statement of Interest

The New York City Transit Authority ("Transit Authority") submits this brief amicus curiae in support of petitioners (now "Rudolph W. Giuliani as Mayor of the City of New York, et al." and referred to collectively in this brief as "the City of New York"). This brief, to whose filing the parties have consented,[1] urges this Court to grant the City of New York's Petition for a Writ of Certiorari in this case, Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996), petition for cert. filed sub nom. Giuliani v. Yourman, No. 96-152 (1996), in which the Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, Yourman v. Dinkins, 826 F. Supp. 736 (S.D.N.Y. 1993), "on the opinion[] of the District Court" (84 F.3d at 656). (This litigation, for the sake of simplicity, will be referred to as Yourman.)

The New York City Transit Authority is a New York State public authority and public benefit corporation created under the New York Public Authorities Law, § 1201 et seq. All of the Transit Authority's board members are appointed by the Governor of the State of New York (Public Authorities Law §§ 1201(1), 1263(1)(a)), and it is not an agency, despite its name, of the City of New York. It runs, within New York City, the country's largest public mass transit system -- subways and bus lines that operate 24 hours a day, every day of the year -- and has over 40,000 employees, some 2,000 of whom are deemed "managerial" by the Transit Authority. As managers, while they may normally be scheduled to work five days per week (including weekends in many instances), seven or eight hours per day, they are expected to work longer if operational problems require

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[1] Copies of the parties' letters consenting to the filing of this brief have been filed with the Clerk.

(and they frequently do so). They are paid an annual salary and are not paid overtime, being treated by the Transit Authority as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, because they are, in the Transit Authority's view, within the FLSA's exemption from the Act's overtime pay requirements that is available for "bona fide executive, administrative, or professional" employees (29 U.S.C. § 213(a)(1)). If the Transit Authority could not treat its managers as exempt, it would have to deploy its managers less flexibly to try to limit the amount of overtime it would have to pay to already well-paid personnel, thereby tending to harm service; the Transit Authority would certainly have to pay out more money to its managers (who are already well paid in part because they were not to receive overtime pay), thereby exacerbating its already difficult financial situation; and, perhaps most importantly, the Transit Authority would risk having its managers' becoming less willing to manage their subordinates in a cost-effective manner as the managers' incentive to try to minimize overtime among their subordinates would be compromised by their own eligibility for the kind of overtime they should be controlling .

Shortly after the District Court's decision in Yourman v. Dinkins reported at 826 F. Supp. 736 -- just affirmed by the Second Circuit "on the opinion[] of the District Court" (84 F.3d at 656) -- a number of Transit Authority managers commenced an action for FLSA overtime, relying substantially on the District Court's Yourman v. Dinkins decision. The action against the Transit Authority, Lilenfeld v. Kiepper, No. 93 Civ. 5691, in which there are now 320 plaintiff-employees (none of whom disputes that his or her duties are in fact "managerial"), is pending in the Southern District of New York; no liability

determination has yet been made.[2] And while the employment policies of the Transit Authority at issue in Lilenfeld differ from those of the City of New York in Yourman, some of the legal issues are similar. Because of the enormous importance to the Transit Authority, and to state and local public employers generally, of those legal issues -- going to, for instance, not just the cost of employing and deploying managers but to the ability of such public employers to manage their managers and to have those managers cost-effectively manage their subordinates -- an additional perspective on some of those issues might assist this Court. In this brief, the Transit Authority will try to provide such a perspective in support of the Petition.

ARGUMENT

Introduction

The Petition in this case seeks this Court's review of a Second Circuit decision applying to a local government employer, and interpreting in a controversial way, what that Court of Appeals termed the United States Department of Labor's ("DOL") "salary basis test" (often called the "salary test"), codified at 29 C.F.R. § 541.118(a). The salary basis test, which came into its essentially current form in 1954, was prepared by DOL to help private sector employers determine whether their employees were, under the FLSA's section 13(a)(1) (i.e., 29 U.S.C. § 213(a)(1)), "bona fide executive, administrative, or professional" personnel, and thus statutorily exempt from the FLSA's requirements for overtime pay for work beyond 40 hours in a workweek.

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[2] Cross-motions for summary judgment are sub judice.

The Yourman Courts -- the District Court and the Second Circuit because it adopted the opinion of the lower court -- applied the salary test to local government employers, and accorded controlling deference to that test (as the Yourman Courts understood it), without, however, explaining why they should do so. The Petition thus raises questions about how local governments should manage themselves and whether Congress's intent in expanding the coverage of the FLSA to "non-supervisory" government personnel is fairly expressed by a DOL salary test that, as applied by the Second Circuit in Yourman, covers entire groups of public employees whose duties are concededly managerial. The Petition should be granted because these questions are important to every state and local government and have been dealt with in widely varying ways among the federal courts. Moreover, the Second Circuit's Yourman decision is now in direct opposition to the views of the Department of Labor itself on some of these questions.

I. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DECIDE WHETHER THE SALARY BASIS TEST IS UNENFORCEABLE AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS.

As outlined in the City of New York's Petition, there are many reasons to question whether the Department of Labor's salary test is validly enforceable against state and local government employers. That issue has divided the Courts of Appeals (and District Courts), and appears to be one of the issues before this Court in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), petition for cert. granted, No. 95-897 (1996). That issue calls for the City of New York's Petition to be granted because the issue involves how Congressional intent -- against which the salary test must be measured -- may be determined in an area of

concern to almost every state and local government. So as not to repeat material set out in the Petition, the Transit Authority here will note one matter of public policy and suggest how applying the salary test to state and local governments is inconsistent with that policy and inconsistent with Congress's expressions of its own intent.

Courts have repeatedly ascribed to Congress the intention, when Congress extended the coverage of the FLSA to government employees, of not interfering with those employers' needs to continue to operate on the principle of "public accountability." See, for instance, the discussion in Service Employees Int'l Union, Local 102 v. County of San Diego, 60 F.3d 1346, 1352 (9th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996). And while "public accountability" typically involves the notion of avoiding having government agencies' paying public employees for time not worked (id.), and provisions of the salary test (or the entire test) have been invalidated as to public sector employers where those provisions call for pay for time not worked, there is an even more fundamental aspect of "public accountability" inherent in determining who is a true state or local government manager (and thus exempt from the FLSA's overtime provisions).

"Public accountability" depends on a government's having effective managers to manage the government's affairs, including directing the non-exempt workforce cost-effectively (and minimizing that workforce's overtime in the process). If governmental personnel of undisputed managerial responsibility -- as are all of the plaintiff-employees in the Yourman case, and in the pending Transit Authority litigation -- find themselves, by virtue of the application of the salary test, to be eligible for FLSA overtime because the government's pay or personnel policies are inconsistent in some way with a provision of that

test, those managers (and the public agencies they run) will be put into a difficult situation, a situation potentially destructive of local government's ability to ensure "public accountability" in its operations. Those managers will have a financial stake not in minimizing overtime but in maximizing it, for those they supervise and for themselves. And since such potentially no-longer-exempt managers are already a relatively small percentage of the total number of public sector employees (about 4% in the case of the Transit Authority), and such potentially no-longer-exempt managers ascend up to the highest levels of state and local government (stopping only at managers who are directly appointed by or supervised by, or who serve as "immediate advisor[s] to," elected officials (see, e.g., 29 C.F.R. § 553.11(b)), almost all managers will be placed in a position of being eligible for overtime pay when their responsibilities should call on them to minimize such expenses. (Indeed, among the 320 plaintiffs in the Transit Authority litigation is a former Vice President, the equivalent of an Assistant Commissioner of a city or state agency or department.) In other words, ignoring "public accountability" by applying the salary test to state and local government personnel who are clearly managerial in terms of their duties will raise, inevitably, what Justice Story of this Court elegantly described as that "anxious inquiry": "quis custodiet custodes?" (Briscoe v. Bank of Kentucky, 36 U.S. 257, 348 (1837)).

The answer to that question -- i.e., who will guard the guardians (of the public's money)? -- is to avoid having to answer it by adopting a common sense approach to what almost certainly was Congress's intent in extending the FLSA to government employees. As the City of New York has indicated (Petition, at 19-20), Congress had in mind extending the FLSA only to government employees it repeatedly described as "non-supervisory." And the FLSA was intended "to aid the ...

lowest paid of the nation's working population ... [unable] to secure for themselves a minimum subsistance wage" (Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1944)), not to give well paid personnel with managerial powers and "prestige ... a [further] benefit from their employers for which they did not bargain" (Freeman v. National Broadcasting Co., 80 F.3d 78, 86 (2d Cir. 1996)), or to create difficulties in managers' properly managing their subordinates and exercising their discretion (29 C.F.R. §§ 541.1(f), 541.2(e)) on behalf of the public employer whose affairs they direct. Accordingly, where the duties of governmental personnel are found to be (or, as in Yourman, are conceded to be) managerial, Congress's intent, and the ultimate protection of the principle of "public accountability," call for the salary test to be reviewed by this Court to determine whether the test should be held inapplicable in the public sector as inconsistent with Congress's intent.[3]

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[3] The Department of Labor is not the only agency charged with helping governmental employers decide which employees should be deemed exempt from the FLSA overtime pay requirements, i.e., which employees Congress intended to be included in the statutory classes of "bona fide executive, administrative, or professional" personnel. The FLSA has also become applicable to millions of federal (civilian) employees and the agency charged by Congress with administering the FLSA for most such federal employees, the Office of Personnel Management, has nothing comparable to the DOL's salary test. Instead, it relies on job levels and responsibilities to determine exempt status (5 C.F.R. §§ 551.201-208), a fact noted by the DOL at 57 Fed.Reg. 37667 (Aug. 19, 1992). This divergent approach to interpreting the same statutory exemption language (i.e., the FLSA's section 13(a), 29 U.S.C. § 213(a)(1)) creates, in itself, a doubt about whether the salary test should be given any special deference for state and local governments.

II. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY DECIDE WHETHER THE DISCIPLINARY PROVISIONS OF THE SALARY BASIS TEST ARE UNENFORCEABLE FOR BEING SO BIZARRE AS TO BE NOT RATIONALLY RELATED TO, LET ALONE A PERSUASIVE GUIDE TO, DETERMINING EMPLOYEES' "BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL" STATUS.

The Second Circuit in Yourman, as did the District Court whose decision it affirmed, passed over in silence the bizarre nature of the disciplinary provisions of the salary test. In so doing, the Second Circuit ignored not only the Seventh Circuit's view that the "rationality" of determining true managerial (and thus FLSA-exempt) status based on strict enforcement of those provisions seemed "pretty feeble" (Mueller v. Reich, 54 F.3d at 444), but failed to address the question of whether those provisions are in and of themselves so bizarre as to be unenforceable. Review by this Court would bring sense to this matter, which is critical to every state or local government's ability to control itself by managing its managers flexibly and appropriately.

The salary test's disciplinary provisions, briefly described, allow an employer to suspend managers without pay "for infractions of safety rules of major significance" without affecting the managers' exempt status (29 C.F.R. § 541.(a)(5)). Suspensions without pay for any other reasons jeopardize that status unless they last for an entire workweek or otherwise occur during a workweek in which the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence).

To begin with, not only is there a naturally wide variety of judicial views on what would constitute a "safety rule of major significance,"[4] there is no apparent reason to distinguish, in seriousness or operational importance, between major safety infractions (for which a manager may be suspended without pay without risk to exempt status) and "major" non-safety infractions, whatever they may include (for which infractions a manager might lose his exemption if suspended without pay). Indeed, during World War II and for several years thereafter the version of the DOL salary test then in effect allowed for (private sector) managers to be suspended for non-safety infractions (absenteeism) without losing their exempt status (because that was common practice in the private sector at that time);[5] and -- judging from the numerous FLSA lawsuits involving this matter -- it appears that in the public sector, in the decade since the FLSA became applicable to public-sector employees, at least the possibility of suspensions of managers for non-safety infractions is widespread (if very rarely utilized).

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[4] For instance, in Meringolo v. City of New York, 908 F. Supp. 160, 169 (S.D.N.Y. 1995), the Court was apparently willing to deem any rule violation by a New York City Department of Corrections Captain sufficiently safety-related to be an infraction of a "safety rule of major significance." The Court in Auer v. Robbins, 65 F.3d 702, 710 (8th Cir. 1995), cert. granted, 116 S.Ct. 2545 (1996), disagreed.

[5] See, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 24-26 (June 1949), discussed by the Court in Mueller v. Thompson, 858 F. Supp. 885, 894 (W. D. Wis. 1994), rev'd on other grounds sub nom. Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), petition for cert. filed, 64 USLW 3297 (Oct. 10, 1995).

Surely, for instance, a public sector manager's negligence (or theft) causing the loss of millions of public dollars or the shutting down of public-sector services, or the local government's bankruptcy, could be catastrophic to the public employer, even if "safety" is not involved directly. The oddness of the disciplinary provisions, moreover, can only be exacerbated by the fact that while the DOL's salary test limits the ability of employers to suspend their managers without pay for even the most egregious non-safety misconduct, employers are perfectly free not to pay those same managers for taking a day off for "personal" reasons (such as, presumably, attending a baseball game, a child's graduation ceremony, or a house closing (29 C.F.R. § 541.118(a)(2)).

In addition, the disciplinary portions of the salary test are bizarre in that suspensions of managers without pay for non-safety infractions (or for minor -- or less than "major" -- safety-rule infractions) are quite acceptable to the DOL, and will not endanger exempt status, if the suspensions are for one full workweek (typically five days, say, Monday through Friday); but such suspensions are somehow not acceptable if the five payless days cross from one workweek to another (say, Thursday, Friday, Monday, Tuesday, and Wednesday [or Thursday, Friday, Saturday, Sunday, and Monday][6]), or (normally) if the payless suspension is not for five days in a workweek but for one, two, three, or four days in that workweek. That makes no sense.

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[6] The Transit Authority, which operates its subway and bus lines every day of the year (and 24 hours a day), has numerous managers with normal schedules that call for work on weekends and thus call for "regular days off" on, for instance, Tuesdays and Wednesdays.

Finally, non-safety suspensions (or non-"major" safety infraction suspensions) without pay of less than a workweek are still acceptable to DOL to preserve exempt status if, during the remainder of the workweek, the otherwise exempt employee happens not to come to work, for any reason, so that during that workweek it turns out the employee "performs no work" (29 C.F.R. § 541.118(a), last sentence). Thus, for instance, a manager's four-day non-safety suspension without pay (within one workweek) will not jeopardize exempt status if the manager, by chance or otherwise, does not work on the fifth day (because, perhaps, it is a holiday, or because on the fifth day the manager is sick, on vacation, on jury duty, at a baseball game, or for any other reason "performs no work").

It should not be surprising, therefore, that the courts that do address the matter more and more are deciding that the disciplinary provisions of the salary test are so ludicrous, so lacking a rational explanation, that they should be deemed unenforceable, and disregarded as a regulatory interpretation of the overtime pay exemption provided to "bona fide executive, administrative, or professional" personnel by the FLSA itself at 29 U.S.C. § 213(a)(1). For instance, taking up the Seventh Circuit's apparent invitation in Mueller, 54 F.2d at 443, that the rationality of those provisions should be litigated and decided, the District Court in Bowman v. City of Indianapolis, 927 F. Supp. 309 (S.D. Ind. 1996), determined that the rationality of the provisions is indeed so "'feeble'" as to make those provisions unenforceable:

> "In particular, we do not think it is rational to say that because an employee who is otherwise considered an exempt administrative, professional or executive employee might be docked one or two or three days pay, that it necessarily follows that the employee must

> therefore really be an hourly employee. . . . [I]s a bank vice president, who clearly meets the duties test for an executive employee, and who is paid $100,000 per year, to be considered an hourly employee just because she might be docked a few days pay for swearing at the bank president? The regulation appears to say so but we see no logic in this. . . . [A] $35,000/year executive does not cease to be a $35,000/year executive just because she is suspended for four days for breaking a rule. We do not doubt that it might be rational to look to the length or frequency of disciplinary suspensions without pay as one of several factors in determining the employee's status. However, we do not think it is rational to consider such suspensions as conclusive evidence that an employee is hourly. We therefore find that the disciplinary component of the salary test is arbitrary and capricious, and that, in accordance with the Administrative Procedure Act, we must set aside that regulation."

927 F. Supp. at 315 (emphasis in original). Similar in seeing the disciplinary portion of the salary test as producing "a ludicrous result" is Quirk v. Baltimore County, Md., 895 F. Supp. 773, 783 (D. Md. 1995).

This is not just an abstract argument. The real world consequences of failing to comply with the twists and turns of the disciplinary portion of the salary test regulations could be severe, indeed punishing: in the view of the Second Circuit (and District Court) in Yourman, loss of exempt status of an entire cadre of hundreds of well-paid managers. As a practical matter, the only way for state and local public employers to be sure not to run afoul of the salary test's disciplinary provisions -- which are in part imprecise and in part inexplicably bizarre -- is to pay every suspended manager (at least for a full workweek) although he or she might have to be suspended immediately, even in the

middle of a workweek. For instance, an immediate suspension might be required where the manager appears to have engaged in sexual or racial harassment of other employees, because the employer has a federal statutory obligation to eliminate such harassment from its workplaces (see Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 845 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991)); or where the manager's misconduct makes it essential that the manager immediately lose access to employer records or computers. Paying such a suspended manager would directly violate that aspect of the "public accountability" principle that guides most public payroll systems -- that public employees should not be paid for time they do not work -- and which principle, more and more courts are concluding, Congress did not intend the FLSA (and thus a DOL salary test) to interfere with. See Service Employees Int'l Union, 60 F.3d at 1352.

A final determination of the enforceability of the disciplinary provisions of the salary test, if it results in the invalidity of those provisions, could render the entire salary test invalid. That test -- or set of "interpretations" or "guides," to use the DOL's own words[7] -- was essentially written in 1954 as an interrelated

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[7] The provisions of the salary test themselves twice specifically describe themselves as only "interpretations" (29 C.F.R. § 541.118(a)(6)), and do so in the context of explaining that whether or not a deviation from the "interpretations" should cause a loss of exempt status "will depend upon the facts in the particular case" (id.). The DOL also has characterized its salary test generally as a set of mere "guides" intended to "assist" in determining whether (private sector) employees, "in borderline cases" where the employees' "prestige, status, and importance" are otherwise uncertain, should be deemed "executive, administrative, and professional" employees exempted by Congress from the FLSA's overtime requirements. U.S. Dep't of Labor, Report and Recommendation on Proposed Revision of Regulations, Part 541, at 2-3 (March 1958).

whole. For a court to find a part of the set inapplicable but to enforce the remainder would effectively be an exercise of judicial guideline rewriting or "rulemaking," which is, as the Ninth Circuit observed in deeming the entire salary test inapplicable to the public sector based on the invalidity of one portion of it, "a power with which we are not invested." Service Employees Int'l Union, 60 F.3d at 1354. The contrary view of some courts, such as in McCloskey v. Triborough Bridge and Tunnel Authority, 903 F. Supp. 558, 567 (S.D.N.Y. 1995), which found several parts of the salary test inapplicable to public employers but still applied the remainder of the test to a group of managers, should be rejected.

The historical record shows that Congress did not intend through the FLSA to regulate state and local governments' managing of their managers. The City of New York's Petition should be granted so that this Court may, in light of Congress's intentions, bring logic and reason to all state and local government employers that wish to manage, and occasionally discipline, their managers as they see fit.

III. THE PETITION SHOULD BE GRANTED SO THAT THIS COURT MAY CONFIRM THAT RARE DEDUCTIONS IMPERMISSIBLE UNDER THE SALARY BASIS TEST SHOULD NOT RESULT IN THE ACROSS-THE-BOARD LOSS OF EXEMPT STATUS OF OTHERWISE EXEMPT MANAGERS OF STATE AND LOCAL PUBLIC EMPLOYERS.

The Second Circuit in Yourman, by adopting the District Court's liability decision, in effect concluded that, even though actual deductions from the plaintiffs' salaries that were impermissible under the District Court's understanding of the DOL salary test might be very rare or non-existent, nevertheless all of

the hundreds of plaintiffs -- even though almost none had any such deductions made -- should be deemed to have lost their exempt status (for the entire multi-year liability period) because they all were at least theoretically "subject to" (29 C.F.R. § 541.118(a)) impermissible salary reductions within what was presumed to be the Department of Labor's intended meaning of that language in the salary test. That conclusion calls for this Court to grant review in Yourman because, besides being more evidence of a split of authority among the Circuits (as discussed in the City of New York's Petition, at 34), that "theoretically 'subject to'" view of the salary test has recently been flatly rejected by the Department of Labor itself. And it is the DOL's understanding of what DOL had intended by its salary test that the Circuit Courts have been disagreeing about in this regard.

In the United States' May 31, 1996 amicus brief to this Court in Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), cert. granted, 116 S. Ct. 2545 (June 24, 1996), the Department of Labor's intended meaning of its own salary test's "subject to" language was made exquisitely clear. Rejecting reliance on theoretical possibilities (or rare examples) of pay deductions inconsistent with the salary test, and looking to the practical realities of actual conduct vis-a-vis a state or local government's managers as a group, the Department stated:

> "where no deductions have actually been made, or where there have been only isolated instances in which [impermissible] disciplinary suspensions have occurred, or where [impermissible] suspensions have occurred only under unusual circumstances, employees who are not themselves [impermissibly] suspended do not lose their salaried status."

Brief for the United States as Amicus Curiae at 7 [informal pagination], Auer v. Robbins, No. 95-897 (Supreme Court, May 31, 1996) (LEXIS, Genfed Library, Briefs File). This DOL view of its own salary test is obviously consistent with Congress's statement (albeit one made in a different context) that the FLSA should not be interpreted to allow employees to "receive windfall payments" (29 U.S.C. § 251(a)(4)).

Additionally, as to the one employee (or few employees) who actually suffered the unusual suspensions, the clarified view of the Department of Labor is that the so-called "window of correction" doctrine (see 29 C.F.R. § 541.118(a)(6)) lets the employer maintain the exempt status of even the impermissibly suspended employee(s) if the employer thereafter -- and perhaps long thereafter -- modifies its policies or practices to preclude such impermissible suspensions in the future and states that it intends to reimburse the suspended employee(s). Brief for the United States as Amicus Curiae at 10-11 [informal pagination], Auer v. Robbins. In this aspect too the view adopted by the Second Circuit in Yourman about the Department of Labor's intentions in the salary test -- which view limits the window of correction to only "inadvertent or unintentional" deductions (see 826 F. Supp. at 743) and which view conflicts with, for instance, the Eighth Circuit's view in Auer v. Robbins -- is now obviously and directly contrary to the DOL's view of its own salary test.

The recent clarification of the understanding of the Department of Labor's intended meaning of the salary test by the Department itself ought to be controlling as to what the salary test means and, as indicated above, is contrary to the understanding of the salary test found in Yourman (and in decisions of several other Circuits). The Department of Labor's intended meaning of its salary test, however, while definitively expressed

in the United States' May 31, 1996 Auer v. Robbins amicus brief, deserves effective implementation that this Court may provide through granting the City of New York's Petition in Yourman.

Conclusion

For the reasons outlined above, the City of New York's Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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